Province of
British Columbia

1991

Interim Report on Enforcing Judgments from Outside the Province

LAW REFORM COMMISSION OF BRITISH COLUMBIA

MINISTRY OF ATTORNEY GENERAL

LAW REFORM COMMISSION OF BRITISH COLUMBIA

INTERIM REPORT ON ENFORCING JUDGMENTS FROM OUTSIDE THE PROVINCE

LRC 117

March, 1991

The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

The Commissioners are:

ARTHUR L. CLOSE, Q.C., *Chairman*

HON. RONALD I. CHEFFINS, Q.C., *Vice-Chairman*

MARY V. NEWBURY

LYMAN R. ROBINSON, Q.C.

PETER T. BURNS, Q.C.

THOMAS G. ANDERSON

Gregory G. Blue is Legal Research Officer to the Commission.

Sharon St. Michael is Secretary to the Commission.

Linda Grant provides text processing and technical copy preparation.

The Commission offices are located at Suite 601, Chancery Place, 865 Hornby Street, Vancouver, B.C. V6Z 2G3.

The Law Reform Commission gratefully acknowledges the financial support of the Law Foundation of British Columbia in carrying out this project.

Canadian Cataloguing in Publication Data

Law Reform Commission of British Columbia.
Interim report on enforcing judgments from outside the province

(LRC, ISSN 0843-6053 ; 117)

ISBN 0-7718-9027-3

1. Judgments, Foreign - British Columbia. 2. Judicial assistance - British Columbia. I. Title. II. Title: Enforcing judgments from outside the province. III. Series: Law Reform Commission of British Columbia. LRC ; 117)

KEB533.3.F67L38 1991 341.7'8 C91-092161-X
KF8731.L38 1991

Table of Contents 91-04909/

PAGE

I INTRODUCTION 1
A. The Legal Rules For Enforcing Judgments 1
1. Canada as a Federation 1
2. Recognition and Enforcement of Judgments 1
3. Overview of the Current Law 2
B. The Working Paper 2
C. A National Perspective 3
1. The Focus of the Working Paper 3
2. Coordination of National Reform 4
(a) Service *Ex Juris* 5
(b) *Forum Non Conveniens* 6
(c) Cross Vesting 6
D. The Supreme Court of Canada Decision in *Morguard* 7
E. Further Work of the Commission 8

II RECIPROCAL ENFORCEMENT OF JUDGMENTS 10
A. Uniform Legislation 10
B. Purpose 10
C. Overview 11
1. Registration 11
2. Notice of Application 11
3. *Rules of Court*: Rule 54 11
D. Defences 12
1. Introduction 12
2. Defects in Jurisdiction At Common Law 12
(a) Commencing a Proceeding 13
(b) Service 14
(c) Jurisdiction Over a Defendant 14
(d) Service Within the Foreign Territory 14
(e) Service Outside the Foreign Territory 15
(f) Voluntary Submission 16
(i) Taking Part in the Proceedings 16
(ii) Commencement of Action 17
(iii) Contractual Submission 17
3. The *Morguard* Principles 18
4. Defects in Jurisdiction Under Reciprocal Enforcement Legislation 21
(a) No Jurisdiction Under Private International Law: Section 31(6)(a)(i) 21
(b) Residence, Business and Submission: Section 31(6)(b) 22
(c) Defendant Not Duly Served: Section 31(6)(c) 23
E. Revising Reciprocal Enforcement of Judgments Legislation 23

PAGE

III LIMITATION PERIODS AND FOREIGN JUDGMENTS 25
A. Limitation Periods and Local Judgments 25
B. Judgments from Outside the Province 25
1. *Bank of Montreal* v. *Kim* 26
2. How Sound is the Policy? 27
3. What Limitation Period Should Apply? 30
4. Recommendations 31

IV SUMMARY AND LIST OF RECOMMENDATIONS 33
A. Summary 33
B. List of Recommendations 33
C. Acknowledgements 34

APPENDICES

A *COURT ORDER ENFORCEMENT ACT*
R.S.B.C. 1979, c. 75 35

B BRITISH COLUMBIA *RULES OF COURT*
Rules 13 and 54 41

C SUMMARY OF TENTATIVE PROPOSALS MADE IN *WORKING PAPER ON THE ENFORCEMENT OF JUDGMENTS BETWEEN CANADIAN PROVINCES* (W.P. No. 64, 1989) 46

TO THE HONOURABLE RUSSELL G. FRASER
ATTORNEY GENERAL OF THE PROVINCE OF BRITISH COLUMBIA:

The Law Reform Commission of British Columbia has the honour to present the following:

INTERIM REPORT ON ENFORCING JUDGMENTS FROM OUTSIDE THE PROVINCE

In 1989, the Commission circulated for comment a Working Paper that examined the enforcement of judgments between Canadian provinces. Following publication of the Working Paper, at a national meeting of Attorneys General, a reference was made to the Uniform Law Conference to develop modern legislation dealing with the enforcement of judgments and related issues. The Commission's Working Paper was identified as a point of departure for the work of the Uniform Law Conference.

The Commission has deferred further work in this area until the Uniform Law Conference has had an opportunity to complete the reference. In the meantime, however, two recent decisions (one by the Supreme Court of Canada, the other the British Columbia Court of Appeal) have raised pressing issues relating to reciprocal enforcement of judgments legislation and to the calculation of the limitation period that applies to the enforcement of a judgment from outside the province. This Interim Report examines both of these issues and makes recommendations to revise the *Court Order Enforcement Act* and the *Limitation Act*.

A. The Legal Rules For Enforcing Judgments

1. Canada As A Federation

Although Canada is a single country, for many purposes it is an association of separate states. One of these purposes is the administration of justice as well as the enforcement of judgments. The legal rules governing the enforcement of a judgment between provinces are derived from those which govern the enforcement of judgments between nations.[1] It is only recently that these rules have been modified by the courts so that standards that apply to judgments emanating from within Canada differ from those that originate outside the country.[2] Even so, enforcing one province's judgment in another province is not always a straightforward exercise.

2. Recognition And Enforcement Of Judgments

Two issues arise with respect to a judgment from outside the province. First, will local courts recognize that it creates or affects rights? Only if the judgment is recognized does the second question arise. Will local courts enforce the judgment?

Sometimes simply recognizing a judgment is enough. If the judgment is an order for divorce, for example, and the local court recognizes it, nothing more is called for. So far as British Columbia is concerned, the parties are divorced. Recognizing the judgment will affect the rights between the parties.

In other cases, a judgment is not of much use unless it can be enforced, something that usually calls for court assistance. When a person refuses to abide by a judgment, the judgment is only as good as the machinery available for its enforcement. Usually, a judgment against a person who refuses to pay money is satisfied by seizing and selling that person's property, something which can only be done under the court's authority. If local

---

1. These legal rules are part of the law known as "private international law" or the "law of conflicts."
2. *Morguard Investments Ltd.* v. *de Savoye*, [1991] 2 W.W.R. 217 (S.C.C.). The case concerned the enforcement of an Alberta judgment in British Columbia, but the court's *dicta* might well, on appropriate facts, justify an amendment to the principles that apply to the enforcement of judgments between nations. The *Morguard* case is discussed later in this Report.

courts will not assist in the enforcement of a judgment, it is of limited value.[3]

3. Overview Of The Current Law

A local court will not, as a matter of course, recognize a judgment from another province. The judgment must, in one way or another, be brought to its attention. That might be accomplished by bringing an action on the foreign judgment.[4] Legislation also allows some judgments to be enforced in British Columbia by registering them with the Supreme Court.[5] Even so, not all judgments are enforceable in the province and, when they are, the procedural mechanisms for enforcing them are often expensive and time consuming.[6] For this reason, the judgment creditor may choose to ignore the foreign judgment and bring new proceedings in British Columbia on the original cause of action.

B. The Working Paper

In October, 1989, the Commission published Working Paper No. 64 on the *Enforcement of Judgments Between Canadian Provinces*. The Working Paper examined the current law governing the enforcement of judgments and tentatively concluded that some aspects of it were in need of revision. Draft legislation was set out which would allow a judgment for the payment of money to be registered by simply filing it with the Supreme Court of British Columbia. A registered judgment could be enforced in the province with the assistance of the court.

This approach differes quite substantially from that adopted under current reciprocal enforcement of judgments legislation, which requires the judgment creditor to apply formally to the court for registration and allows a judgment debtor to contest the application on a number of grounds. It was the Commission's tentative conclusion that any objection to the judgment itself

---

3. Strictly speaking, recognizing the validity of a judgment and assisting in its enforcement are two separate concepts but, for our purposes, not much turns on the distinction between them. We do not intend to be too rigorous in our use of terminology on this point.
4. The idea of suing on a judgment may seem strange to some, but a judgment is simply an obligation which can be sued upon to enforce, like other obligations. There are not many situations, however, where it is necessary to bring an action on a judgment to enforce it.
5. A *Uniform Reciprocal Enforcement of Judgments Act* has been adopted in most of the provinces: *see, e.g., Court Order Enforcement Act*, R.S.B.C. 1979, c. 75, Part 2. This legislation is reproduced in Appendix A.
6. *See, e.g., Crothers* v. *Simpson Sears Ltd.*, [1988] 4 W.W.R. 673, 681 (Alta. C.A.).

should be brought in the province or territory where the judgment was made. As part of the Canadian federation, British Columbia should fully recognize judgments from other provinces.[7] In other jurisdictions, a convenient phrase has been adopted for describing the operative principle. It is referred to as giving "full faith and credit" to the judgment.

These amendments to the law, in our view, are necessary for two reasons. First, the political structure of Canada requires respect and cooperation between the provinces, particularly as to enforcing judgments, and traditional principles of the law which restrict or inhibit such a result are contrary to the best interests of the country and of each of the provinces. Moreover, the enforcement of judgments in British Columbia from other Canadian provinces and from other countries is an area of increasing importance for a number of reasons. The age when one province or country can, or would choose to, ignore its neighbours is past. British Columbia's economic prosperity depends upon its participation in the national and world economy, and the enforcement of obligations across provincial borders is a necessary aspect of that participation.

This is a very brief overview of the Working Paper, which examined these issues in detail. A summary of the tentatively proposed draft legislation is set out in Appendix C to this Interim Report.

Some of our correspondents were reluctant to amend the current rules, but the majority of them, while differing on points of detail, generally endorsed the Commission's approach.[8]

C. A National Perspective

1. The Focus Of The Working Paper

The focus of our inquiry in the Working Paper was confined by what one province is capable of accomplishing. It was our tentative conclusion that British Columbia should enact legislation allowing almost all Canadian judgments for the payment of

---

7. There would be no obligation to notify the judgment debtor of registration of the judgment under the new legislation. A local court, however, would, in certain circumstances, be permitted to stay enforcement of the judgment pending proceedings in the province where the judgment was originally made. In that way, the judgment debtor would be able to raise any valid objection to the judgment or the manner in which it was obtained.

8. *See, e.g.*, V. Black, "The Enforcement of Judgments Between Canadian Provinces," (1990) 69 Can. B. Rev. 813.

money to be enforced in the province.[9] It was also our view, however, that the reasons supporting the enactment of new legislation in British Columbia suggested that similar legislation should be enacted across Canada, through joint legislative action by the provinces. This subject is really one that calls for a national perspective.

2. Coordination Of National Reform

The need for revising the law relating to the enforcement of judgments between the provinces on a national basis was considered at a meeting of Attorneys General in 1990 who subscribed to a resolution requesting the Uniform Law Conference to develop modern legislation dealing with

(i) the enforcement of Canadian judgments between the provinces,

(ii) rules for service of court process outside the territorial boundaries of the court,

(iii) rules for determining when a court should accept and when it should decline jurisdiction over a matter affecting more than one part of Canada, and

(iv) a procedure for transferring jurisdiction to the courts of one province or territory to deal with a proceeding commenced in another province or territory.

The resolution adopted by the Attorneys General expressly endorsed the principle of "full faith and credit" and referred to our Working Paper as a point of departure for the work of the Uniform Law Conference.

The subject was considered by the Uniform Law Conference of Canada at its 1990 annual meeting. The Conference accepted the reference and struck up a working group to carry the matter forward.[10]

The reference deals with not only the enforcement of judgments between the provinces, but a series of related legal issues.

---

9. *See* Appendix C.

10. The process by which this matter was brought to the attention of the Conference was one that we had suggested in the Working Paper. It was our concern that the Conference, which is well placed to carry out and coordinate work with national implications and which has carried out that task for the better part of this century, should not undertake work of this magnitude without first having an expression by the provinces of both interest in the subject and the political will to act.

Some comment on the scope of the reference to the Uniform Law Conference is in order.

(a) Service Ex Juris

Various systems of law have differed on the approach to be taken to determine whether a defendant might be served with court process outside the borders of a particular province or country. The technical term for serving a person outside the court's territory is "service *ex juris*." Since service is regarded as a precondition for the exercise of jurisdiction, the service *ex juris* rules play a large role in defining when a court has jurisdiction to hear a matter.[11]

The importance of examining jurisdictional rules in conjunction with devising modern rules for the enforcement of judgments between the provinces was underscored by comments received on the Working Paper. One correspondent observed:[12]

> I am generally in favour of "automatic" enforcement of all money judgments between the provinces, but I have one concern which is not adequately addressed in your working paper....[A]utomatic enforcement of all provincial money judgments would have the effect of giving the provinces a considerably greater effective judicial jurisdiction than the courts in comparable "federal" states possess. The reason for this is that other "federal" regimes (including the EEC) which permit automatic enforcement do so only in conjunction with considerable limits on the jurisdiction of the rendering court – limits which are more constraining than the ex juris rules of most Canadian provinces. In the United States the Full Faith and Credit provisions of the U.S. Constitution provide for "automatic" enforcement, but other provisions of the same Constitution limit state long arm jurisdiction so that it is more circumscribed than the ex juris jurisdiction of some Canadian provinces.
>
> It seems to me that in this country the long period in which judicial jurisdiction has not been tied to inter-provincial enforcement has contributed to a situation in which provincial ex juris rules have become very broad – broader than comparable rules in the EEC, the USA or Australia. If you simply step in at this stage and link jurisdiction to enforcement you may create a situation which is unfair to certain defendants....Automatic enforcement should be accompanied by a slightly constricted judicial reach.

---

11. The Commission has published a *Study Paper on Court Jurisdiction* (written by John Horn) in which proposals are made to rationalize the law governing when a court should have jurisdiction.

12. *See also* V. Black, "Enforcement of Judgments and Judicial Jurisdiction in Canada," (1989) 9 Oxford J. Legal Stud. 547.

This position also found favour in a recent decision of the Supreme Court of Canada in which the "full faith and credit" principle was endorsed:[13]

> Before going on, I should observe that academic writers have now engaged the issue on a broader plane...; see Robert J. Sharpe, Interprovincial Product Liability Litigation (1982); John Swan, "Recognition and Enforcement of Foreign Judgments: A Statement of Principle", in Springman and Gertner, op. cit., c. 16, at pp. 691 et seq.; John Swan, "The Canadian Constitution, Federalism and the Conflict of Laws" (1985), 63 Can. Bar Rev. 271; Vaughan Black, "Enforcement of Judgments and Judicial Jurisdiction in Canada," (1989) 9 Oxford J. Legal Stud. 547. Their approaches are not identical but in a broad sense it may be said that their thesis is that the conditions governing the taking of jurisdiction by the courts of one province and those under which they are enforced by the courts of another province should be viewed as correlative. If it is fair and reasonable for the courts of one province to exercise jurisdiction over a subject matter, it should as a general principle be reasonable for the courts of another province to enforce the resultant judgment. For a number of these writers, there are constitutional overtones to this approach; see also Peter W. Hogg, Constitutional Law of Canada (2nd ed. 1985), at pp. 278-80. It is fair to say that I have found the work of these writers very helpful in my own analysis of the issues.

(b) Forum Non Conveniens

Tied to the issue of when a court should have jurisdiction is the question of when it should decline jurisdiction in favour of a court in a territory better suited to hear a dispute. The principle of law involved is called *"forum non conveniens."* Recent years have witnessed significant legal developments, so that it is uncertain to what degree the law of the provinces is consistent in this area. The coordination of provincial cooperation will facilitate devising, as part of modern enforcement of judgments legislation, uniform rules relating to when a court should accept or decline jurisdiction over a matter that affects more than one Canadian province or territory.

(c) Cross Vesting

Each province has a separate system for the administration of justice, so that problems may sometimes arise if a court in one province declines jurisdiction in favour of a court in another. For one thing, a new proceeding must be commenced, but the expiration of a limitation period may preclude this. Some of these problems are addressed by the court declining jurisdiction subject to

---

13. *Morguard, supra*, n. 2, *per* Mr. Justice La Forest.

conditions which must be observed by the parties. Even if the proceeding can be brought, however, there is often inconvenience and expense since new court documents must be filed and the parties must all be served again.

One approach for avoiding these kinds of problems is to be found in legislation enacted in Australia,[14] which provides a mechanism for allowing jurisdiction to be transferred or "swapped" between the states as may be appropriate.

This is an approach which should be considered in Canada, since it goes some distance toward smoothing over jurisdictional gaps that arise from the division of powers between the provinces and the federal government with respect to the administration of justice. It is a method of harmonizing the various Canadian judicial systems so that, while they will remain distinct, the administration of justice can operate consistently, particularly in those cases where a national perspective must be adopted for the resolution of disputes involving the interests of more than one province or territory.

D. The Supreme Court of Canada Decision in *Morguard*

In the time since publication of the Commission's Working Paper, the Supreme Court of Canada has heard,[15] and now handed down,[16] its judgment in *Morguard Investments Ltd.* v. *de Savoye*, which deals with the principles that should govern the enforcement of judgments between Canadian provinces.

In the course of the judgment, Mr. Justice La Forest observed:

> ...there is really no comparison between the interprovincial relationships of today and those obtaining between foreign countries in the 19th century. Indeed, in my view, there never was and the courts made a serious error in transposing the rules developed for the enforcement of foreign judgments to the enforcement of judgments from sister-provinces. The considerations underlying the rules of comity apply with much greater force between the units of a federal state, and I do not think it much matters whether one calls these rules of comity or simply relies directly on the reasons of justice, necessity and convenience to which I have already adverted.

---

14. *See* the *Jurisdiction of Courts (Cross-Vesting) Act, 1987* (Cth). A Canadian response, however, has to operate within a different constitutional framework to meet similar ends. Provincial cooperation is required to legislate upon issues which, in Australia, can be dealt with by the Federal government.
15. April 23, 1990.
16. December 20, 1990. *Supra*, n. 2.

It was on this philosophical basis – judgments from other Canadian jurisdictions should be given full faith and credit – that the Commission proceeded in formulating the proposals made in the Working Paper.

E. Further Work of the Commission

The reformulation of the common law principles by the Supreme Court of Canada has moved the law in the direction we tentatively proposed, and the course of work charted by the Uniform Law Conference should result in the development of legislation to complete the task. For these reasons, it would be premature for the Commission to proceed to final Report on the whole of the subject embraced in our earlier Working Paper. Moreover, since it is anticipated that the Uniform Law Conference will be devising comprehensive legislation, unilateral action by the province would be something of an interim measure, since the product of the Conference will be reviewed, either by the Commission or another appropriate body, with a view to implementing the new uniform legislation.

It might be expected, however, that some time will pass before the Conference finishes its work, and there are one or two matters that, in our view, should be given prompt attention.

The *Morguard* principles apply only when the judgment creditor brings an action on the judgment in British Columbia. Uniform reciprocal enforcement of judgments legislation is unfortunately closed to a judgment creditor who does not satisfy the classical jurisdictional requirements for enforcing foreign judgments.[17] In our view, because the uniform legislation is designed to provide a modern and summary method of enforcing judgments from outside the province, it should be brought into step with developments in the common law. We propose to consider necessary revisions to uniform reciprocal enforcement legislation in the light of the *Morguard* case.

The second point arises from a recent decision of the British Columbia Court of Appeal dealing with the limitation period that should apply to a judgment from outside the province.[18] The

---

17. The extent to which reciprocal enforcement legislation in its current form might accommodate the *Morguard* principles is considered in Chapter II.
18. *Bank of Montreal* v. *Kim*, (1990) 40 C.P.C. 11 (B.C.C.A.).

decision reveals that an amendment to the *Limitation Act* is called for.

We will examine these two aspects of the enforcement of judgments from outside the province. This Report, however, should be regarded as being of an interim nature, pending the completion of the work of the Uniform Law Conference referred to above.

A. Uniform Legislation

Legislation providing for the enforcement of judgments has been adopted in almost identical form by all the provinces and territories except Quebec.[1] It is based on the *Uniform Reciprocal Enforcement of Judgments Act* promulgated by the Uniform Law Conference of Canada.[2] The British Columbia version of this legislation is set out in Appendix A.

The legislation is reciprocal – it provides a mechanism for enforcing certain judgments from places that have enacted similar legislation[3] – and it only applies to judgments for the payment of money.

B. Purpose

The legislation allows judgments from another province that are registered under it to be enforced as if they were local judgments. It is, basically, a summary method of bringing the judgment to the attention of local courts and is intended to be a quicker and less expensive alternative to enforcing judgments by action.[4]

The legislation has not enlarged the range of foreign money judgments that may be enforced in British Columbia. Moreover, a number of safeguards have been built into the legislation to protect persons liable under a judgment that was made outside the province.[5]

---

1. In British Columbia, *see Court Order Enforcement Act*, R.S.B.C. 1979, c. 75, Part 2, ss. 30-41.

2. The British Columbia legislation was first enacted in 1959: S.B.C. 1959, c. 70. The former *Reciprocal Enforcement of Judgments Act*, S.B.C. 1925, c. 44 was also based on the work of the Commissioners on Uniformity of Legislation in Canada: Proceedings of the Seventh Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1924) 283-4 and 327-330.

3. The Lieutenant Governor in Council may designate reciprocating jurisdictions and these are listed in the *Court Order Enforcement Act*: *see* s. 39. In addition to Canadian provinces and territories, the schedule includes Queensland, Victoria, Austria and the Federal Republic of Germany. Washington State and a further nine Australian States were added to the list on July 5, 1989. Separate legislation deals with the reciprocal enforcement of judgments from the United Kingdom: *see Court Order Enforcement Act*, Part 2.2 (ss. 41.2-41.7) and Schedule 4. This implements at the provincial level a treaty between Canada and the United Kingdom.

4. *Can. Credit Men's Trust Ass'n. Ltd.* v. *Ryan*, [1930] 1 D.L.R. 280, 281-2 (Alta. S.C.). *See also First City Capital Ltd.* v. *Lupul*, [1987] 6 W.W.R. 212, 215 (Sask. C.A.); *Rafferty's Restaurants Ltd.* v. *Sawchuk*, [1983] 3 W.W.R. 261, 263 (Man. Co. Ct.); *Moore* v. *Mercator Enterprises Ltd.*, (1978) 90 D.L.R. (3d) 590, 599 (N.S.S.C.).

5. Swan, "Recognition and Enforcement of Foreign Judgments: A Statement of Principle," in Springman & Gertner, eds., *Debtor-Creditor Law: Practice and Doctrine* (1985) 641, 704, n. 38.

C. Overview

1. Registration

The Act allows a judgment[6] from another province[7] to be registered in British Columbia. Once registered, it is enforceable as if made by a local court.

The legislation sets out when a judgment may be registered and in what situations registration must be refused or set aside. The procedure for registering a judgment is also addressed in the legislation, though points of detail are more fully set out in the *Rules of Court*.[8]

2. Notice Of Application

A judgment creditor must apply[9] to the court for an order to register the judgment. A set of rules determines when the judgment creditor is required to notify the judgment debtor of the application.[10]

3. Rules Of Court: Rule 54

Rule 54 sets out the procedure to be followed for registering a judgment under Part 2 of the *Court Order Enforcement Act*. It also applies to proceedings under the Convention for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters,[11] which deals with the enforcement of judgments between Canada and the United Kingdom.[12]

---

6. The judgment must be for a sum of money and have been made in a civil proceeding. An arbitral award enforceable as a judgment in another province may be registered under the legislation. Support orders are not enforceable under the legislation: s. 30(1). The enforcement of maintenance orders is addressed by other federal and provincial legislation: *Divorce Act, 1985*, S.C. 1986, c. 4; *Family Relations Act*, R.S.B.C. 1979, c. 121, Part 4.1. A judgment for costs is enforceable under B.C. legislation (*Deutsche Nemectron Gmbh.* v. *Dolker*, (1984) 51 B.C.L.R. 162 (S.C.), but not under the Manitoba statute: *Technical Coatings Co.* v. *Samuel Building Systems Ltd.*, (1990) 40 C.P.C. (2d) 210 (Man. Q.B.).
7. Or listed reciprocating jurisdiction.
8. Rule 54.
9. The application must be made within 6 years after the date of the judgment: s. 31(1).
10. These rules turn on whether or not the debtor was personally served with the court documents commencing the proceedings that led to the granting of the foreign judgment.
11. *See* Schedule 4 of the *Court Order Enforcement Act*, R.S.B.C. 1979, c. 75, as am. *Court Order Enforcement Amendment Act*, S.B.C. 1985, c. 70.
12. The procedure set out in Rule 54 conflicts with the provisions of Part 2 in two respects. The Rule says that an application for registration may be made without notice to the judgment debtor. Under the Act, however, an application without notice is only permitted if the defendant was either personally served with the court documents that led to the judgment, or submitted to the court's jurisdiction. Is Rule 54 or the Act to apply? The Rule also requires that an affidavit accompany the application for registration of the judgment. *(cont....)*

D. Defences

1. Introduction

A number of defences are available to a judgment debtor who opposes the registration of a judgment from outside the province, or who wishes a registration set aside. The debtor may resist enforcement of the judgment under the legislation, for example, on the ground that it was obtained by fraud,[13] is under appeal,[14] or should not be enforced because of reasons of public policy.[15]

In this Report, our concern is with defences that are based on defects in the jurisdiction of the court that granted the judgment. Before reviewing the position adopted under reciprocal enforcement legislation, it is useful to refer to the common law principles that apply when a judgment creditor attempts to enforce a judgment from outside the province by action.

2. Defects In Jurisdiction At Common Law

The *Morguard* case was referred to in the last Chapter. It has amended some aspects of the classical principles which determine when a local court would recognize a foreign court's exercise of jurisdiction. Later in this Chapter, we will discuss the current law as set out by the Supreme Court of Canada in *Morguard*. Reciprocal enforcement of judgments legislation, however, is structured in terms of the former, unrevised principles of the common law. These are discussed in this section.

A judgment from out of the province will not be enforced unless the court granting it was competent to do so. A court is competent to make a judgment if it has:

(a) jurisdiction over the defendant; and

(b) jurisdiction over the subject matter of the dispute.

---

12. *(...cont.)* The affidavit must state that the defendant was duly served with court documents for the earlier proceeding, but there are situations where a judgment is enforceable even where the defendant was not duly served: *e.g.*, the judgment debtor may have fully participated in the original proceedings (*i.e.*, submitted to them) or the judgment debtor may have initiated them. A judgment creditor should not be required, as a condition of proceeding under reciprocal enforcement legislation, to serve a judgment debtor (who was a plaintiff in the original proceedings) with the documents that the judgment debtor/plaintiff filed to commence the proceedings. Will a court refuse to order the registration of judgments because the judgment debtor was not duly served? Perhaps a court faced with this problem will be able to find a way around the technical gap in the Rule.
13. S. 31(6)(d).
14. S. 31(6)(e).
15. S. 31(6)(e).

It is rare to find jurisdiction over the subject matter of a dispute ever in question.[16] Questions concerning the enforceability of a judgment, however, often center on whether the foreign court had jurisdiction over the defendant.[17]

EXAMPLE:

A, who lives in British Columbia, injures B in Alberta. B sues A in an Alberta court. A is served in British Columbia, but does not defend the action. Is B's judgment enforceable in British Columbia?

The answer to this question depends upon whether a British Columbia court will recognize the jurisdiction the Alberta court purported to exercise over A. The balance of this Section sets out the circumstances in which a British Columbia court will accept that a court outside the province has jurisdiction over a defendant.

The following discussion draws upon particular aspects of British Columbia law to provide illustrations, but it should be understood that the principles are of general application.

(a) Commencing a Proceeding

A proceeding is commenced by filing formal documents with the court. Historically, in England, the document that commenced legal proceedings was called a "writ," and most systems of law derived from the English continue to use the writ. In British Columbia, there are two alternative forms of proceedings: one is commenced by a writ of summons, the other (which is more streamlined) by petition.

---

16. The issue may arise, *e.g.*, where the proceeding involves land outside the court's territory: *British South Africa Co.* v. *Companhia de Mocambique*, [1893] A.C. 602 (H.L.); *Boslund* v. *Abbotsford Lumber, Mining & Development Co.*, [1925] 1 W.W.R. 475 (B.C.C.S.); *Albert* v. *Fraser Companies Ltd.*, [1937] 1 D.L.R. 39 (N.B.S.C.A.D.); *Hesperides Hotels Ltd.* v. *Muftizade*, [1979] A.C. 508 (H.L.).

17. The problem arises where the defendant did not take part in the proceedings. When that happens, a plaintiff is entitled to take a default judgment without a hearing on the merits of the claim.

(b) Service

Once filed with the court, the documents that commence the proceedings must be served on the defendant. In this way, the court's jurisdiction is asserted over the defendant.

Service usually consists of presenting the actual documents to the defendant, but if a defendant cannot be personally served the court may sometimes allow service to be completed in another way [18] by making an order for "substituted service." Service may be made, for example, by serving someone other than the defendant, or by publishing a notice in a newspaper. Every effort is made to bring proceedings to the attention of a defendant, and an order for substituted service will provide for it to be made in some reasonable way. There is no guarantee, of course, that a defendant will actually be aware of the substituted service, but that does not render it ineffective to support an eventual judgment.[19] The law adopts this position since any other would encourage defendants to evade service.

(c) Jurisdiction Over a Defendant

The idea of jurisdiction is tied up with service. It is simpler, however, to think of the process as consisting of two parts. The first part is a determination of whether, if a defendant can be served, the court has jurisdiction to decide a particular matter. The second part is asserting a court's jurisdiction by serving the defendant. Where a defendant is served can determine whether the court has jurisdiction.

(d) Service Within the Foreign Territory

A court has jurisdiction over a resident served within its territory. Less clear are the circumstances when a court may ex-

---

18. *See* Rule 12 of the British Columbia *Rules of Court*. This discussion is at a very general level. There are any number of ways a person may be served which entail neither personal service, nor a court order authorizing the service. *Rules of Court*, legislation or a contract may set alternative methods of service. For example, in British Columbia, parties are free to agree between themselves on how service will be effected: Rule 13(8). A small claims summons is properly served if sent by registered mail to the defendant at the defendant's last known post office address: *Small Claim Act*, R.S.B.C. 1979, c. 387.

19. *See Terrell* v. *Terrell*, [1971] V.R. 155 (S.C.); *Re Gacs and Maierovitz*, (1968) 68 D.L.R. 345 (B.C.S.C.); *Canton Trust and Commercial Bank Ltd.* v. *Wong*, (1968) 89 W.N. (N.S.W.) (Pt. 1) 189; *British Motor Trade Association* v. *Godden*, (1950) 67 W.N. (N.S.W.) 135. If a defendant can establish not only that there was no notice of the proceeding but also "a good defence on the merits," however, the court which granted the judgment may set it aside and allow the action to be defended: *Watt* v. *Barnett*, (1878) 3 Q.B.D. 363, 366 (C.A.).

ercise jurisdiction over a person who resides outside of the territory, even where service is made in the territory.[20]

(e) Service Outside the Foreign Territory

Many places (British Columbia among them) provide that a defendant may be served outside their borders. In British Columbia, the situations where this may be done are listed with some precision.[21]

There are two concerns relating to the exercise of jurisdiction over a defendant who is outside the territory. The first is whether it is fair to require a person to respond to distant litigation. The second is the interference by one state with another state's sovereignty. It is open to question whether the first of these retains any validity in Canada, where travel and communication across the country is convenient and relatively inexpensive, and whether the second ever had any validity with respect to federations.

Whether a court has jurisdiction to consider a matter is determined by one set of rules. A court asked to enforce a judgment from outside the province, however, will assess the granting court's jurisdiction according to another set of rules, called rules of private international law.[22] These rules are narrow. They tend to regard a court's competence as being confined to the borders of its territory. One state may often refuse to enforce a judgment against a defendant who is outside the granting court's territory, unless the defendant voluntarily submitted to the court's jurisdiction.

Why is competence not judged by whether the foreign court had jurisdiction under its own domestic law? For one reason, the law of some states on when a court may assert jurisdiction over a defendant who lives outside its territory is considered too encom-

---

20. For a thorough discussion of the role of service of the writ as the means of establishing *in personam* jurisdiction, *see Laurie* v. *Carroll*, (1958) 98 C.L.R. 310, 322ff. (Aust. H.C.); *cf. John Russell and Company, Ltd.* v. *Cayzer, Irvine and Company, Ltd.*, [1916] 2 A.C. 298 (H.L.). *See also* Castel, *Canadian Conflict of Laws* (2nd ed., 1986) 190; North and Fawcett, *Cheshire & North's Private International Law* (11th ed., 1987) 342; Lowenfeld, "Conflict of Laws English Style," (1989) 37 A.J.C.L. 353. The general rule is that a court has jurisdiction over a defendant who was present (although this is often expressed in terms of "residence") in the territory when the proceedings were commenced and who was served in the territory, unless the defendant was induced by fraud to come into the territory to be served.

21. Rule 13. That rule lists circumstances where there is some connection between the parties, or the subject matter of their dispute, and the province. Rule 13 is set out in Appendix B.

22. *Marcotte* v. *Megson*, (1987) 24 C.P.C. (2d) 201, 211; *Veco Drilling Inc.* v. *Armstrong*, [1982] 1 W.W.R. 177 (B.C.S.C.).

passing.[23] The rules of private international law provide a more objective standard by which jurisdiction can be assessed, but these rules were formulated in another day, and tend to be very conservative.

Whatever the merit of these rules as they are applied between countries, to what extent is it necessary, or appropriate, for one Canadian court to inquire into the exercise of jurisdiction by another Canadian court?[24] British Columbia courts assert jurisdiction over persons who reside in Canada but outside the province in much the same way as courts in other Canadian provinces.[25] Nevertheless, many situations in which Canadian courts will accept jurisdiction are considered exorbitant by private international law. Until the decision in *Morguard Investments Ltd.* v. *de Savoye*,[26] British Columbia courts also refused to enforce judgments from other Canadian courts in situations where, had a British Columbia court been faced with the litigation, it might have accepted jurisdiction.

(f) Voluntary Submission

All of the rules which govern when a court may take jurisdiction are irrelevant if a defendant chooses to submit to the court's jurisdiction.

The three ways in which voluntary submission may occur are discussed in this section.

(i) Taking Part in the Proceedings

No question about jurisdiction arises if a person accepts another's choice of the appropriate court for litigating the matter. Acceptance may be signified in a number of ways, all of which indicate a desire to defend the action. A person who accepts is said to submit voluntarily or "attorn" to the court's jurisdiction.[27]

What is sufficient to qualify as voluntary submission? Participating in the court proceedings to contest the plaintiff's claim

---

23. *See* De Winter, "Excessive Jurisdiction in Private International Law," (1968) 17 I.C.L.Q. 706.

24. The Commission has recently published a Study Paper which examines in detail the issue of when a court should accept jurisdiction: Horn, *Study Paper on Court Jurisdiction* (1989).

25. Two provinces allow their courts to assume jurisdiction over any defendant located within Canada or the United States: Nova Scotia *Civil Procedure Rules*, Rule 10.17; Prince Edward Island *Rules of Court*, Rule 10.07; *see also* Quebec's *Code of Civil Procedure*, R.S.Q. 1977, c. C-25, art. 137, as am. S.Q. 1983, c. 28, s. 1.

26. [1991] 2 W.W.R. 217 (S.C.C.); the Court of Appeal decision is to be found at (1988) 27 B.C.L.R. (2d) 155, [1988] 5 W.W.R. 650. *See also Marcotte*, *supra*, n. 22.

27. *Emmanuel*, *ibid.*, at 309 *per* Buckley L.J.

is clearly voluntary submission,[28] as is any formal step taken in the proceedings for that purpose.

In British Columbia, a defendant who wishes to contest a claim files with the court a document called an "appearance." That alone is sufficient to constitute a voluntary submission.[29]

A distinction must be drawn between contesting a claim on its merits and objecting to a court's exercise of jurisdiction.[30] A number of cases have considered whether, in the circumstances, filing an appearance disputing the ability of a court to hear a matter, is a submission to the court's jurisdiction.[31]

(ii) Commencement of Action

One usually thinks that a judgment is obtained by a plaintiff, but it is open to a defendant to raise claims against the plaintiff.[32] If judgment is made in favour of the defendant, the plaintiff cannot object to the court's jurisdiction. Commencing an action is a voluntary submission to the court's jurisdiction, not just for the original claim but for any matter properly raised in the proceedings.[33]

(iii) Contractual Submission

When two people enter into a business enterprise which has cross-border implications, they are well-advised to settle in ad-

---

28. *Re Attorney-General of British Columbia and Becker*, (1978) 87 D.L.R. (3d) 536 (B.C.S.C.); *United States of America* v. *Cassidy*, (1977) 79 D.L.R. (3d) 635 (B.C.S.C.); *Clinton* v. *Ford*, (1982) 37 O.R. (2d) 448 (C.A.); *First National Bank of Houston* v. *Houston E&C, Inc.*, (1990) 47 B.C.L.R. 347 (C.A.). Informally requesting documents, however, is not a voluntary submission: *Standal's Patents Ltd.* v. *Lakeland Mills Ltd.*, [1990] B.C.D. Civ. 3644-01 (S.C.).

29. *E.g.*, *Nelson* v. *Payne*, (1968) 64 W.W.R. 175 (B.C.S.C.); *cf. Canada Trustco Mortgage Co.* v. *Rene Management & Holdings Ltd.*, (1988) 53 D.L.R. (4th) 222, 230 (Man. C.A.). *See* Rule 14 of the *Rules of Court*. Even sending a letter to the court may constitute submission: *Roglass Consultants Inc.* v. *Kennedy*, (1984) 65 B.C.L.R. 393 (C.A.); *Re Overseas Food Importers & Distributors Ltd. and Brandt*, (1981) 126 D.L.R. (3d) 422 (B.C.C.A.).

30. Rule 14(6) authorizes an application for a declaration that the court declines jurisdiction.

31. In British Columbia, the rules provide that an application disputing jurisdiction does not constitute submission to the court's jurisdiction (Rule 14(8)); *see further Dovenmuehle* v. *Rocca Group Ltd.*, (1981) 85 A.P.R. 444, *aff'd.* [1982] 2 S.C.R. 534; *Re Dulles Settlement Trusts*, [1951] 2 All E.R. 69 (C.A.); *Church of Scientology of California* v. *World Federation for Mental Health Inc.*, (1981) 31 B.C.L.R. 136 (C.A.); *cf. Henry* v. *Geoprosco International Ltd.*, [1976] Q.B. 726 (C.A.); *Kennedy* v. *Trites Ltd.*, (1916) 10 W.W.R. 412 (B.C.S.C.); *Re McCain Foods Ltd. and Agricultural Publishing Co.*, (1979) 103 D.L.R. (3d) 724, 26 O.R. (2d) 758 (H.C.), *aff'd.* 26 O.R. (2d) 768n (C.A.). A similar issue considered in a number of cases is the effect of filing an appearance in order to contest both the court's jurisdiction and the merits of the plaintiff's claim: *Re Dulles Settlement Trusts*, *ibid.*; *Clinton* v. *Ford*, (1982) 37 O.R. (2d) 448 (C.A.); *Richardson* v. *Allen*, (1916) 28 D.L.R. 134 (Alta. S.C.A.D.); *Henry* v. *Geoprosco*, *ibid.*; *Church of Scientology of California*, *ibid.*

32. In addition to the possibility that a defendant might be granted judgment on counterclaim in a proceeding commenced by the plaintiff, the defendant might also receive a judgment for costs of the proceeding where, *e.g.*, the plaintiff is the unsuccessful party.

33. *Clitherow* v. *Krushnisky*, (1987) 11 B.C.L.R. (2d) 11; 22 C.P.C. (2d) 314 (S.C.); *Hong Koon Kung* v. *Ning Koon Kung*, (1990) (B.C.C.A.); *S.r.l. Rolimex* v. *McCormack Zatzman Ltd.*, (1979) 78 A.P.R. 436 (N.B.S.C.); *Swaizie* v. *Swaizie*, (1899) 31 O.R. 324 (Div. Ct.).

vance anticipated problems. For example, they may agree on the law that should govern their dealings, or decide which territory's courts are to have jurisdiction to resolve a dispute between them.

An agreement to submit to a court's jurisdiction qualifies as a voluntary submission,[34] but nothing less than an express agreement will do. An agreement that the law of a particular province is to govern a dispute, for example, is not a voluntary submission to the jurisdiction of the courts of that province.[35]

3. The Morguard Principles

The previous sections discussed the traditional principles which determine whether a foreign court has jurisdiction over a defendant. The judicial innovations introduced in the *Morguard* case are more fully discussed in this section.

The case involved a mortgage on land in Alberta. The borrower moved from Alberta to British Columbia. When the mortgage went into default, the lender brought proceedings in Alberta. None of the traditional bases for asserting jurisdiction over an absent defendant, recognized by principles of private international law, were present. This, however, did not prevent the Alberta court from giving judgment (similarly, a British Columbia court in analogous circumstances would have accepted jurisdiction and granted a judgment to the lender). The lender brought an action in British Columbia on the Alberta judgment. The judgment debtor defended the action asserting that the Alberta court had no jurisdiction to grant the judgment. At trial and on appeal it was held that the Alberta judgment was valid and enforceable in British Columbia.[36]

The British Columbia Court of Appeal based its decision on the view that a local court should recognize a judgment from another province if the granting court took jurisdiction in circumstances where, if the facts were transposed to British Columbia, the court in British Columbia would have taken jurisdiction. On

---

34. *Veco Drilling Inc.*, *supra*, n. 22; *Vogel* v. *R. and Kohnstamm Ltd.*, [1973] 1 Q.B. 133; *First City Capital Ltd.*, *supra*, n. 4; *Mattar* v. *Public Trustee*, [1952] 3 D.L.R. 399 (Alta. S.C.A.D.); *cf. Blohn* v. *Desser*, [1962] 2 Q.B. 116; *Bank of Montreal* v. *Snozell*, (1982) 143 D.L.R. (3d) 349 (Alta. Q.B.).

35. *First City Capital Ltd.* v. *Winchester Computer Corp.*, (1987) 44 D.L.R. (4th) 301 (Sask. C.A.); *Dunbee Ltd.* v. *Gilman & Co.*, (1968) 70 S.R. (N.S.W.) 219 (C.A.).

36. *See* (1987) 18 B.C.L.R. (2d) 262, [1988] 1 W.W.R. 87 (S.C.); (1988) 27 B.C.L.R. (2d) 155, [1988] 5 W.W.R. 650, 29 C.P.C. (2d) 52 (C.A.).

the facts, this test was satisfied, and the Alberta judgment was enforceable in British Columbia.

The Supreme Court of Canada confirmed the decision of the Court of Appeal in result but adopted a different basis for determining when a court in one province should enforce a Canadian judgment emanating from another province.[37] The Supreme Court of Canada rejected the reciprocity approach in favour of a substantial connection test. The court of one province should enforce a judgment emanating from another province where the defendant or the subject matter of the dispute have a real and substantial connection with the forum in which the judgment is granted. Mr. Justice La Forest regarded this as a reasonable constitutional limit on the jurisdiction of a province's courts.

In reaching this result, the Supreme Court of Canada redefined the principle at work: the reason for enforcement is comity, but not simply limited to its traditional sense of respect for the sovereignty of another state. It is comity in the sense of mutual self-interest and convenience, largely arising from the needs of cross-border commerce and the nature of the Canadian federation:

> For my part, I much prefer the more complete formulation of the idea of comity adopted by the Supreme Court of the United States in *Hilton* v. *Guyot* in a passage cited by Estey J. in *Spencer* v. *The Queen* as follows:
>
> > "Comity" in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws": *Hilton* v. *Guyot*, 159 U.S. 113 (1895), at pp. 163-64.
>
> As Dickson J. in *Zingre* v. *The Queen*, citing Marshall C.J. in *The Schooner Exchange* v. *M'Faddon*, (1812) stated, "common interest impels sovereigns to mutual intercourse" between sovereign states. In a word, the rules of private international law are grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner. Von Mehren and Trautman have observed in "Recognition of Foreign Adjudications: A Survey and A Suggested Approach": "The ultimate justification for according some degree of recognition is that if in our highly complex and interrelated world each community exhausted every possibility of insisting on its parochial interests, injustice would result and the normal patterns of life would be disrupted."

37. *Supra*, n. 26.

....

> This formulation suggests that the content of comity must be adjusted in the light of a changing world order. The approach adopted by the English courts in the 19th century may well have seemed suitable to Great Britain's situation at the time. One can understand the difficulty in which a defendant in England would find himself in defending an action initiated in a far corner of the world in the then state of travel and communications. The *Symon* case, *supra*, where the action arose in Western Australia against a defendant in England, affords a good illustration. The approach, of course, demands that one forget the difficulties of the plaintiff in bringing an action against a defendant who has moved to a distant land. However, this may not have been perceived as too serious a difficulty by English courts at a time when it was predominantly Englishmen who carried on enterprises in far away lands. [citations omitted]

The principles identified by the court seem broad enough to apply not only to Canadian judgments, but all foreign judgments. Nevertheless, the focus of Mr. Justice La Forest's judgment was confined to a Canadian context:

> For present purposes, it is sufficient to say that, in my view, the application of the underlying principles of comity and private international law must be adapted to the situations where they are applied, and that in a federation this implies a fuller and more generous acceptance of the judgments of the courts of other constituent units of the federation. In short, the rules of comity or private international law as they apply between the provinces must be shaped to conform to the federal structure of the Constitution.

The concern most often voiced in this context is the plight of the defendant who must answer litigation commenced away from his or her residence. Mr. Justice La Forest addressed this concern:

> I am aware, of course, that the possibility of being sued outside the province of his residence may pose a problem for a defendant. But that can occur in relation to actions *in rem* now. In any event, this consideration must be weighed against the fact that the plaintiff under the English rules may often find himself subjected to the inconvenience of having to pursue his debtor to another province, however just, efficient or convenient it may be to pursue an action where the contract took place or the damage occurred. It seems to me that the approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties. It affords some protection against being pursued in jurisdictions having little or no connection with the transaction or the parties. In a world where even the most familiar things we buy and sell originate or are manufactured elsewhere, and where people are constantly moving from province to province, it is simply anachronistic to uphold a "power theory" or a single situs for torts or contracts for the proper exercise of jurisdiction.

4. Defects In Jurisdiction Under Reciprocal Enforcement Legislation

Various provinces, including British Columbia, have adopted reciprocal enforcement of judgments legislation to provide a simpler and more efficient means of enforcing judgments. Once registered in accordance with the legislation, a judgment from outside the province may be enforced like a local judgment. Unfortunately, some parts of the Act adopt a pre-*Morguard* view and preserve aspects of the common law in its original form for determining what judgments may be registered under it. These are the sections that determine when a court outside the province may exercise jurisdiction over the defendant or subject matter of the proceedings.

The legislation provides:

> **31.** (6) No order for registration shall be made if the court to which application for registration is made is satisfied that
>
> (a) the original court acted either
>
> (i) without jurisdiction under the conflict of laws rules of the court to which application is made; or
>
> (ii)...
>
> (b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident in the state of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court;
>
> (c) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business in the state of that court or had agreed to submit to the jurisdiction of that court;...

The import of paragraphs (a) to (c) in subsection (6) are considered in the balance of this section.

(a) No Jurisdiction Under Private International Law: Section 31(6)(a)(i)

Paragraph 31(6)(a)(i) prevents a judgment from out of the province from being registered if the court that granted it lacked jurisdiction over either the defendant or the subject matter of the proceeding. Courts considering this paragraph have followed traditional principles to determine whether the foreign court had

jurisdiction, although it is possible that in the future a modified approach may be adopted in light of the *Morguard* decision.

(b) Residence, Business and Submission: Section 31(6)(b)

A court has jurisdiction over a person who willingly takes part in the proceedings. If a person does not, according to traditional principles of law the court has no jurisdiction unless the person was present in the territory when the proceedings were commenced. Corporations have no physical presence. The test for them is whether they do business in the territory.

The common law requirement for presence was linked to the need to serve the defendant with the court's process. At one time, the court could only assume jurisdiction over a person served within its territory. That position has long been changed, but principles of international law still insist on a defendant's presence within the territory. What exactly is meant by "presence?" The concept has been described as follows:[38]

> There is no adjectival qualification of the term "presence". It cannot and should not be equated with residence or even domicile. Even the most temporary presence will suffice for purposes of service, and it seems to matter little that the presence was unintended or dictated by other circumstances. The conclusiveness of physical presence is not altogether absolute, since there is authority for the proposition that presence which is involuntary may not be an appropriate basis for service. Thus, if the defendant is fraudulently induced into entering the territory, service upon him may be set aside if it can be proved that the resulting action would thereby be vexatious and oppressive. The same result would obtain if the defendant were forcibly brought into the territory against his will.

The Act, in section 31(6)(b), takes a different approach for determining when the court has jurisdiction over an unwilling litigant. The Act states the defence in terms of residence and carrying on business. A judgment is unenforceable against a person who is not ordinarily resident,[39] or doing business, in the court's territory, unless the person submitted to the court's jurisdiction.

---

38. Lown, "Conflict of Laws: Jurisdiction, Recognition and Enforcement," in Dunlop, *Creditor-Debtor Law in Canada* (1981) 463 at 467-8.

39. *See, e.g., Royal Bank of Canada* v. *Lo*, (1990) 46 B.C.L.R. (2d) 161 (S.C.). Residence is determined by reference to the date the action was commenced, not the date when the cause of action arose: *Re Kelowna & District Credit Union and Perl*, (1984) 13 D.L.R. (4th) 756 (Alta. C.A.). *See also Re McTavish and Hampton Securities and Investments Ltd.*, (1983) 150 D.L.R. (3d) 27 (Alta. Q.B.); *MacDonald Bros.* v. *Antec International*, (1983) 29 Sask. R. 4 (Sask. Q.B.); *Re Royal Bank of Canada and Industmarine Ltd.*, [1982] 3 W.W.R. 449 (B.C.S.C.); *Citizen's Finance Co. Ltd.* v. *O'Leary*, (1979) 63 A.P.R. 208 (N.B.Q.B.T.D.).

The *Morguard* principles allow a court to recognize the jurisdiction over a defendant assumed by a court where there is a substantial connection between the action and the foreign court, and the connection need not involve residence in the province. That principle, however, is inconsistent with the defence set out in section 31(6)(b) of the Act. Consequently, some judgments which are enforceable in British Columbia by action may not be registered under the Act.

(c) Defendant Not Duly Served: Section 31(6)(c)

A defendant must be advised that proceedings are taking place, which is done by serving the defendant with the process of the court, although service may, it seems, be made substitutionally[40] or outside the court's territory.[41] There is some doubt, however, whether service outside the court's territory satisfies the statutory requirement in section 31(6)(c) that the defendant be "duly served."[42] It is possible, consequently, that the manner in which a defendant is served may be unobjectionable when the judgment is enforced by action, but fatal under reciprocal enforcement legislation.

E. Revising Reciprocal Enforcement of Judgments Legislation

The Working Paper that preceded this Interim Report examined in detail the operation of both the common law and reciprocal enforcement of judgments legislation, and set out draft legislation to introduce necessary amendments. The approach we adopted is consistent with the principles confirmed by the Supreme Court of Canada in the *Morguard* case. A summary of the draft legislation tentatively proposed is to be found in Appendix C to this Interim Report. As mentioned earlier, however, we have deferred work on all but a few aspects of this subject, pending completion of the reference to the Uniform Law Conference.

In that regard, it is our conclusion that, as an interim measure, reciprocal enforcement legislation must be modified to bring it into step with the judicial innovations introduced in the

---

40. *Re Gacs and Maierovitz*, (1968) 68 D.L.R. (2d) 345 (B.C.S.C.); *Canton Trust and Commercial Bank Ltd.* v. *Wong*, (1968) 89 W.N. (N.S.W.) (Pt. 1) 189; *British Motor Trade Association* v. *Godden*, (1950) 67 W.N. (N.S.W.) 135.
41. S. 30(1).
42. *See Hoffman Lumber and Supply Ltd.* v. *Auld*, (1958) 24 W.W.R. 552 (B.C.S.C.); Feltham, "Reciprocal Enforcement of Judgments Act," (1960) 1 U.B.C. L. Rev. 229, 241; Sharpe, *Interprovincial Product Liability Litigation* (1982) 42.

Morguard case. The limitations placed on this legislation were recognized by the Supreme Court of Canada:

> I turn finally to an argument faintly pressed by the appellants, namely that the Legislature of British Columbia, like that of other provinces, appears to have recognized the judicial rules as adopted in *Symon*...in the *Court Order Enforcement Act*...and no addition can, therefore, properly be made to the grounds there stated...
>
> There is a short answer to this argument. The *Reciprocal Enforcement of Judgments Acts* in the various provinces were never intended to alter the rules of private international law. They simply provided for the registration of judgments as a more convenient procedure than was formerly available, i.e., by bringing an action to enforce a judgment given in another province.

While nothing in reciprocal enforcement legislation limits the development of common law principles that apply when an action is brought on a judgment, it is our view that the legislation should not be left in its present form, endorsing rules for summary enforcement under statute that have now been rejected by the courts when an action is brought on the judgment. A relatively minor amendment is all that is necessary to bring the legislation into step with common law developments.

The Commission recommends:

1. Section 31 of the Court Order Enforcement Act *be amended by adding a subsection comparable to the following:*

> *(9) Notwithstanding subsection (6), an order for registration shall not be refused under paragraphs (a), (b) or (c) where the judgment could have been enforced in British Columbia by bringing an action on it.*

Subsection 31(6) lists defences that may be raised by a judgment debtor to resist registration of a judgment from outside the province. Paragraphs (a), (b) and (c) list the former rules whereby a judgment was unenforceable if the foreign court lacked jurisdiction over the defendant. Adding a new subsection (9) brings the legislation into line with the principles approved by the Supreme Court of Canada in *Morguard*, reinforcing the procedural nature of the legislation (the purpose of which is to provide a summary method of enforcing judgments from outside the province, not create alternative substantive rules for enforcement).

A. Limitation Periods and Local Judgments

A person who delays may eventually be prevented from pursuing a legal claim. That is the function of legislation that sets out time periods (called "limitation periods") during which legal proceedings must take place.[1]

But taking judgment does not allow a person to sit on the claim. It merely starts another clock running. If the judgment is not satisfied in time, the judgment creditor will be prevented from taking further proceedings.[2]

B. Judgments From Outside The Province

A judgment from outside the province is not treated in the same fashion as a local judgment. Different rules apply to each.[3] In fact, the legal principles inherited from English law hold that a judgment from outside the territory is not a judgment at all.[4] It is regarded as a debt.

Consequently, a person pursuing a claim will be faced with a whole series of limitation periods. There will be the initial limitation period on when an action must be commenced; the judgment itself will only have a limited life, according to the rules of the territory where the judgment was made; and where steps are taken to enforce the judgment in other territories, their local laws will determine when proceedings must be commenced.

---

1. Limitation periods for specific matters are to be found in various statutes, but the general statute is the *Limitation Act*, R.S.B.C. 1979, c. 236. The Commission has examined limitation periods in a number of projects: *see Report on Limitations* (LRC 15, 1974) which led to the enactment of the *Limitation Act*. Other related publications are: *Report on the Ultimate Limitation Period: Limitation Act, Section 8* (LRC 112, 1990); *Limitations – Abolition of Prescription* (LRC 1, 1970).
2. In British Columbia, a judgment survives for 10 years: *Limitation Act*, R.S.B.C. 1979, c. 236, s. 3(2)(f). A judgment creditor, however, may keep the judgment alive by suing on it in fresh proceedings: *see, e.g., Toore* v. *Braich*, (1979) 12 B.C.L.R. 303 (S.C.).
3. Section 3(2)(f) of the *Limitation Act*, which provides for a limitation period of 10 years from the date of judgment only applies to local judgments: see the definition of judgment in the *Limitation Act*.
4. *Dupleix* v. *De Roven*, 2 Vern. 540.

1. BANK OF MONTREAL v. KIM[5]

What limitation period applies when a foreign judgment is being enforced in British Columbia? This is a question that recently arose for the consideration of the British Columbia Court of Appeal in *Bank of Montreal* v. *Kim*. The dates of the particular events are important.

The Bank took judgment against the defendant, K, in Ontario in April, 1982. K later moved to British Columbia. The Bank learned of K's whereabouts in 1987 and sued K on the Ontario judgment in British Columbia in October, 1988. Over six years had passed between the taking of the judgment in Ontario and the commencement of the British Columbia proceedings.

Counsel for the defendant argued that the plaintiff was out of time. The British Columbia legislation governing the proceedings brought by the Bank provides that:

> **3.** (4) Any other action not specifically provided for in this Act or any other Act shall not be brought after the expiration of 6 years after the date on which the right to do so arose.

The question was: when did the limitation period begin to run? In terms of the section, when did the right to bring the action arise?

The Court of Appeal decided that the right to bring the action did not exist until the defendant moved to British Columbia. Although that date was unknown, it was certainly within six years of the commencement of the British Columbia proceedings, which, consequently, were not barred by the *Limitation Act*:[6]

> As to when the right to bring the action in British Columbia on the Ontario judgment arose, there can be little doubt that it did not arise until Mr. Kim became resident in British Columbia. Prior to that date, there was no connection with British Columbia. There was no jurisdiction in a British Columbia court to entertain such an action.
>
> ...
>
> The conclusion in *Bera* v. *Marr*, supra, that the "right to bring an action" referred to in s. 3(2) of the Act accrues when all the elements of the cause of action have come into existence must necessarily apply to the same words in s. 3(4) of the Act. However, when applied to the circumstances of this case the result is different, for the territorial reasons referred to earlier. The right to bring an action in British Columbia could not accrue until the ele-

5. (1990) 40 C.P.C. 11 (B.C.C.A.).
6. *Ibid.*, pp. 15-16, *per* Gibbs J.A.

ments necessary to a cause of action in British Columbia had come into existence.

Has the Court of Appeal established a rule that the limitation period on enforcing a foreign judgment only begins to run when the defendant becomes a British Columbia resident? As discussed earlier in this Report, the residence of the defendant in the province is not in itself conclusive on whether a British Columbia court has jurisdiction to hear the matter. It has been observed,[7] moreover, that the court could have asserted jurisdiction before K arrived in British Columbia if K had property[8] or was domiciled in the province.[9]

A good argument can be made that the decision of the Court of Appeal should not be narrowly interpreted. In the *Kim* case, the only factor tying the defendant to British Columbia was presence in the province. Other factors, however, may cause the limitation period to begin running from another time. The limitation period applicable to a foreign judgment may prove to be very fluid, and not always readily apparent on the facts of the case.

2. How Sound Is The Policy?

The idea that a limitation period should not begin to run until the defendant is in the court's territory is not a new one. English legislation advanced this policy in the early 1700's,[10] and it could still be found in British Columbia legislation as recently as the mid-1970's. The British Columbia legislation read as follows:[11]

> **9.** If any person or persons against whom there is or shall be any cause or suit or action of trespass, detinue, actions sur trover or replevin, for taking away goods or cattle, or of action of account or upon the case, or of debt grounded upon any lending or contract without specialty, or debt for arrearages of rent, or assault, menace, battery, wounding, and imprisonment, or any of them, be or shall be at the time of any such cause or suit or action given or accrued fallen or come beyond the seas, that then such person or persons who is or shall be entitled to any suit or action shall be at liberty to bring the said actions against such person or persons after their return from beyond the seas, within such times as are respectively limited for the bringing of the said actions by this Act.

---

7. Professor E. Edinger, (1990) 48 Adv. 983.
8. Rule 13(1)(p).
9. Rule 13(1)(d).
10. *Administration of Justice Act, 1705*, 4 & 5 Anne, c. 3, s. 19.
11. *Statute of Limitations*, R.S.B.C. 1960, c. 370.

Although the legislation speaks of the defendant being beyond the seas, the courts interpreted the section as applying when a defendant was outside the territory.[12]

The law governing limitations was the subject of a comprehensive examination by this Commission in 1974 [13] and the Commission's recommendations led to the enactment of the current *Limitations Act*.[14] On the recommendation of the Commission, the policy of this section was not carried forward into the new legislation:[15]

> The Commission has concluded that limitation periods should not be relaxed because either the potential plaintiff or potential defendant is absent from the jurisdiction....In cases where the defendant is absent from the jurisdiction, a potential plaintiff might prefer to await his return before commencing his action, rather than incurring the added expense of applying for leave to issue and serve the writ *ex juris* or, in situations where *ex juris* service is not available, commencing an action in a foreign jurisdiction. To that extent it might be said that to permit time to run against the plaintiff will cause him some hardship; however, cases in which the running of time would leave the plaintiff without any remedy whatever will be comparatively rare, if not nonexistent.

Is it possible to justify the revival of the abandoned policy in favour of postponing the running of time until a defendant comes within the court's territory? It might seem that there is some prospect of prejudice to a plaintiff with a foreign judgment if the limitation period begins to run when the judgment is made. The defendant, for example, might wait until the limitation period expires before moving to British Columbia. In such a case, the plaintiff is completely unable to take steps in British Columbia to enforce the judgment within the prescribed time, a result that, viewed alone, is undoubtedly unfair. Proudfoot J., as she then was, referred to this concern in the decision at trial:[16]

> I hesitated to mention the question of public policy: however, it surely was not the intention of the Legislature to make British Columbia a safe haven for absconding debtors, *i.e.*, to stay in hiding for a 6-year period after the judgment is pronounced in another province, than arrive in British Columbia.

Of course, the purpose of legislation should not be to protect the absconding debtor, but the policy advanced by the law through

---

12. *Schact* v. *Schact*, (1982) 37 B.C.L.R. 344, [1982] 5 W.W.R. 189 (C.A.).
13. LRC 6, 1974.
14. S.B.C. 1975, c. 37; *see now Limitation Act*, R.S.B.C. 1979, c. 236.
15. *Ibid.*, at 65.
16. *Bank of Montreal* v. *Kim*, (1989) 36 C.P.C. (2d) 242, 249 (S.C.).

the mechanism of the limitation period requires a careful balancing of interests and, eventually, legitimate claims are brought to an end. It is useful to spend a few moments reviewing some fundamental aspects of the law regarding limitation periods which suggest that the court's analysis in the quotation above is incomplete.

First, the plaintiff is not necessarily left without a remedy. In some cases, the plaintiff will be able to sue on the judgment in the jurisdiction where it was made and in this way restart the running of time. For example, in British Columbia, a judgment creditor may, while the judgment is still valid, bring another action on it. The new judgment would be subject to a new limitation period.[17] The plaintiff would be unable to do this if the judgment were unenforceable where it was made by reason of the expiration of a limitation period. Judicial concern over British Columbia becoming a haven for absconding debtors really only arises in this context. But it cannot be good policy for British Columbia courts to enforce expired foreign judgments.

Moreover, looking at the issue from another perspective, little if anything is gained by postponing the running of time until a defendant arrives within the province. A period of years is made available to the judgment creditor to enforce the judgment. Just because the defendant comes into British Columbia late in the day does not mean that the plaintiff has not had ample opportunity to enforce the judgment against the defendant in another province or country. Not all judgment debtors will cooperate with the judgment creditor. They may attempt to conceal assets or leave the jurisdiction, but such efforts are not in themselves seen as good reasons for postponing the running of time on a local judgment. Why then, should they be of significance when dealing with a judgment that emanates from outside the jurisdiction?

Lastly, the postponement of the running of time is inconsistent with the fundamental policy advanced by limitation periods, which is to ensure that claims are pursued expeditiously and with diligence. This policy is frustrated if the law is interpreted so as to keep stale claims alive for extended periods of time. Situations where the law makes an exception to the general policy are rare.

---

17. *Toore* v. *Braich*, *supra*, n. 2.; *Young* v. *Younge*, (1985) 62 B.C.L.R. 154 (C.A.). A plaintiff, however, would not be permitted to bring an action on the judgment if it would be an abuse of process.

In our view, legislation should confirm that the limitation period for enforcing a foreign judgment commences running from the date of the judgment. It is true that legislation implementing our recommendation will place an obligation on the judgment creditor from outside the province to actively seek to enforce the judgment, but that is, after all, the function of limitation periods and the policy they embody applies equally to all who seek to advance legal claims.

3. What Limitation Period Should Apply?

We have given some thought to identifying the period of time that might reasonably be allotted a judgment creditor for enforcing a judgment. Three options are available:

1. The time period allowed in the territory where the judgment is made.
2. The time period currently allowed under the *Limitation Act* (6 years).
3. The time period currently allowed for local judgments under the *Limitation Act* (10 years).

The first option, essentially, would allow a foreign judgment to be enforced so long as it was valid in the territory where it was made. As a general principle, this would appear to be entirely acceptable, but one factor has led us to reject it. The issues canvassed in this Chapter could arise when a judgment creditor attempts to enforce a judgment from anywhere in the world, and there is no guarantee that the limitation period that applies would be a reasonable one. In British Columbia, for example, the former limitation period for a judgment was 20 years, and many jurisdictions probably still allow such a lengthy time for enforcement. Other jurisdictions may apply no limitation period at all. The limitation period on judgments has been cut back substantially in this province because of the prejudice that arises from allowing legal rights to be enforced long after it is reasonable to expect that the necessary materials and evidence are available to adjudicate faithfully upon the issues. It is, consequently, wise to identify a period that is consistent with the principles underlying limitations legislation that have been adopted in British Columbia.

The six year period that currently applies to foreign judgments is a reasonable candidate, but one that we do not recommend, because British Columbia legislation identifies a different time period for local judgments. In our view, it is desirable to adopt a single, uniform limitation period for the enforcement of all judgments in British Columbia. Under the *Limitation Act*, local judgments are valid for 10 years from the date of judgment. The same period should apply to a foreign judgment, provided it is still valid in the jurisdiction where it was granted.

4. RECOMMENDATIONS

The Commission recommends that:

2. *The* Limitation Act *should be amended by adding a new section which provides that an action shall not be brought on a judgment emanating from outside the province*

   (a) where the judgment is unenforceable in the jurisdiction where it was made by reason of the expiration of a limitation period; or

   (b) in any event, after the expiration of 10 years from the date of the judgment.

Implementing the recommendation will require some amendment to the definitions in the *Limitation Act*. The manner in which the Act defines the term "judgment" restricts it to judgments made by British Columbia courts.[18] Consequently, referring to a judgment that emanates from outside the province may lead to confusion. This problem might be resolved if the legislation were to refer to judgments made in British Columbia as "local judgments." In this way, the term "judgment" can be used generically, and qualified to refer to those that arise outside the province.

Judgments from outside British Columbia may also be enforced under the reciprocal enforcement of judgments legislation. The *Court Order Enforcement Act* allows judgments that are made by a court in a reciprocating jurisdiction to be registered with the Supreme Court. After registration, the judgment may be enforced as if it were a local judgment. The time allowed for registration is 6 years from the date of judgment. This time

18. An exception is made for some kinds of foreign arbitral awards: *see* s. 1.

period should also be adjusted to be consistent with the rules that govern both the enforcement of a foreign judgment by action and the enforcement of a local judgment.[19]

The Commission recommends that:

3. Section 31(1) of the Court Order Enforcement Act *be amended to provide that a judgment creditor may apply to the Supreme Court within 10 years after the date of the judgment to have the judgment registered in that court, provided the judgment is enforceable in the jurisdiction where it was made.*

19. The need to make this amendment is not pressing, and action could await the conclusion of the work of the Uniform Law Conference, since the current legislation is based on uniform legislation promulgated by the Conference. Nevertheless, it is our conclusion that the limitation period that applies to local and foreign judgments should be the same. Consequently, it would be useful to make this amendment when action is taken on the other recommendations made in this Interim Report.

CHAPTER IV SUMMARY AND LIST OF RECOMMENDATIONS

A. Summary

As the title of this document indicates, it is an interim report. The Uniform Law Conference has under way a project dealing with the full range of issues addressed in our *Working Paper on the Enforcement of Judgments Between Canadian Provinces* as well as other related areas of the law and, consequently, we have deferred the preparation of a final Report until after the Conference completes the terms of its reference. The recommendations made in this Interim Report focus on necessary amendments to the law, the implementation of which, it is our view, should not be deferred.

We have considered recent developments in the law relating to when a court in one province will recognize the jurisdiction exercised by the courts of another province and recommend an amendment to the *Court Order Enforcement Act* to bring reciprocal enforcement of judgments legislation into line with these common law developments.

We have also considered an issue relating to the calculation of an appropriate limitation period on the enforcement of a judgment emanating from outside the province. The need to address this issue was highlighted by recent judicial activity. We have recommended an amendment to both the *Limitation Act* and the *Court Order Enforcement Act* to deal with the matter.

B. List of Recommendations

The following recommendations are made in this Interim Report:

1. *Section 31 of the* Court Order Enforcement Act *be amended by adding a subsection comparable to the following:*

> *(9) Notwithstanding subsection (6), an order for registration shall not be refused under paragraphs (a), (b) or (c) where the judgment could have been enforced in British Columbia by bringing an action on it.*

2. *The* Limitation Act *should be amended by adding a new section which provides that an action shall not be brought on a judgment emanating from outside the province*

(a) where the judgment is unenforceable in the jurisdiction where it was made by reason of the expiration of a limitation period; or

(b) in any event, after the expiration of 10 years from the date of the judgment.

3. *Section 31(1) of the* Court Order Enforcement Act *be amended to provide that a judgment creditor may apply to the Supreme Court within 10 years after the date of the judgment to have the judgment registered in that court, provided the judgment is enforceable in the jurisdiction where it was made.*

C. Acknowledgments

We wish to record our gratitude to those who commented on the *Working Paper on the Enforcement of Judgments Between Canadian Provinces*. Their comments, criticism and advice assisted us greatly in the preparation of this document. Not all of the issues considered in the Working Paper have been addressed in this Interim Report and, when we return to consider outstanding matters (following the completion by the Uniform Law Conference of its work on the reference on this subject) the submissions we received will continue to guide our final deliberations.

We also wish to thank Bruce McKinnon, a former staff lawyer with the Commission, who carried responsibility for the initial legal research and writing on this project.

ARTHUR L. CLOSE, Q.C.

LYMAN R. ROBINSON, Q.C.

HON. RONALD I. CHEFFINS, Q.C.

PETER T. BURNS, Q.C.

MARY V. NEWBURY

THOMAS G. ANDERSON

APPENDIX A

COURT ORDER ENFORCEMENT ACT

R.S.B.C. 1979, c. 75

PART 2

Reciprocal Enforcement Of Court Orders

Interpretation

30. (1) In this Part

"judgment" means a judgment or order of a court in a civil proceeding, where money is made payable, and includes an award in an arbitration proceeding if the award, under the law in force in the state where it was made, has become enforceable in the same manner as a judgment given by a court in that state, but does not include an order for the periodical payment of money as alimony or as maintenance for a spouse or former spouse or reputed spouse or a child of any other dependant of the person against whom the order was made;

"judgment creditor" means the person by whom the judgment was obtained, and includes his executors, administrators, successors and assigns;

"judgment debtor" means the person against whom the judgment was given, and includes any person against whom the judgment is enforceable in the state in which it was given;

"original court" in relation to a judgment means the court by which the judgment was given;

"registering court" in relation to a judgment means the court in which the judgment is registered under this Part.

(2) All references in this Part to personal service mean actual delivery of the process, notice or other document, to be served, to the person to be served with it personally; and service shall not be held not to be personal service merely because the service is effected outside the state of the original court.

Application for registration of judgment

31. (1) Where a judgment has been given in a court in a reciprocating state, the judgment creditor may apply to the Supreme Court within 6 years after the date of the judgment to have the judgment registered in that court, and on application the court may order the judgment to be registered.

(2) An order for registration under this Part may be made *ex parte* in any case in which the judgment debtor

(a) was personally served with process in the original action; or

(b) though not personally served, appeared or defended, or attorned or otherwise submitted to the jurisdiction of the original court,

and in which, under the law in force in the state where the judgment was made, the time in which an appeal may be made against the judgment has expired and no appeal is pending or an appeal has been made and has been disposed of.

(3) In a case to which subsection (2) applies, the application shall be accompanied by a certificate issued from the original court and under its seal and signed by a judge or the clerk of it.

(4) The certificate shall be in the form set out in Schedule 2, or to the same effect, and shall set forth the particulars as to the matters mentioned in it.

(5) In a case to which subsection (2) does not apply, notice of the application for the order as is required by the rules or as the judge considers sufficient shall be given to the judgment debtor.

(6) No order for registration shall be made if the court to which application for registration is made is satisfied that

(a) the original court acted either

(i) without jurisdiction under the conflict of laws rules of the court to which application is made; or

(ii) without authority, under the law in force in the state where the judgment was made, to adjudicate concerning the cause of action or subject matter that resulted in the judgment or concerning the person of the judgment debtor;

(b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident in the state of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court;

(c) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business in the state of that court or had agreed to submit to the jurisdiction of that court;

(d) the judgment was obtained by fraud;

(e) an appeal is pending or the time in which an appeal may be taken has not expired;

(f) the judgment was for a cause of action that for reasons of public policy or for some similar reason would not have been entertained by the registering court; or

(g) the judgment debtor would have a good defence if an action were brought on the judgment.

(7) Registration may be effected by filing the order and an exemplification or certified copy of the judgment with the registrar of the court in which the order was made, and the judgment shall be entered as a judgment of that court.

(8) Where a judgment provides for the payment of money and also contains provisions for other matters, the judgment may only be registered under this Part for the payment of money.

Jurisdiction to issue certificate

32. Where the original court is a court in the Province, that court has jurisdiction to issue a certificate for registration of a judgment in a reciprocating state.

Conversion to Canadian currency

33. Where a judgment sought to be registered under this Part makes payable money expressed in a currency other than the currency of Canada, the registrar shall determine the equivalent of that sum in the currency of Canada on the basis of the rate of exchange prevailing at the date of the judgment in the original court, as ascertained from any branch of any chartered bank; and the registrar shall certify on the order for registration the sum deter-

mined expressed in the currency of Canada; and, on its registration, the judgment shall be a judgment for the sum certified.

Where judgment in language other than English

34. Where a judgment sought to be registered under this Part is in a language other than the English language, the judgment or the exemplification or certified copy of it, as the case may be, shall have attached to it for this Part a translation in the English language approved by the court, and on approval being given the judgment shall be deemed to be in the English language.

Effect of registration

35. Where a judgment is registered under this Part,

(a) the judgment, from the date of the registration, is of the same force and effect as if it had been a judgment given originally in the registering court on the date of the registration, and proceedings may be taken on it accordingly, except that where the registration is made under an *ex parte* order, no sale or other disposition of any property of the judgment debtor shall be made under the judgment before the expiration of one month after the judgment debtor has had notice of the registration or a further period as the registering court may order;

(b) the registering court has the same control and jurisdiction over the judgment as it has over judgments given by itself; and

(c) the reasonable costs of and incidental to the registration of the judgment, including the costs of obtaining an exemplification or certified copy from the original court and of the application for registration, are recoverable in the same manner as if they were sums payable under the judgment if the costs are taxed by the proper officer of the registering court and his certificate is endorsed on the order for registration.

Order sought by one party only

36. (1) Where a judgment is registered under an order made *ex parte*

(a) within one month after the registration or within a further period as the registering court may at any time order, notice of the registration shall be served on the judgment debtor in the same manner as a writ of summons is required to be served; and

(b) the judgment debtor, within one month after he has had notice of the registration, may apply to the registering court to have the registration set aside.

(2) On such an application the court may set aside the registration on any of the grounds mentioned in section 31 (6) and on terms the court thinks fit.

Rules of court

37. Rules of court may be made for practice and procedure, including costs, in proceedings under this Part; and, until rules are made under this section, the rules of the registering court, including rules as to costs, apply with the necessary changes.

Exercise of powers

38. Subject to the Rules of Court, any of the powers conferred by this Part on a court may be exercised by that court.

Reciprocating jurisdictions

39. (1) Where the Lieutenant Governor in Council is satisfied that reciprocal provisions will be made by a state in or outside Canada for the enforcement of judgments given in the Province, he may by order declare it to be a reciprocating state for this Part.

(2) The Lieutenant Governor in Council may revoke an order made under subsection (1), and the state for which the order was made ceases to be a reciprocating state for this Part.

Saving

40. Nothing in this Part deprives a judgment creditor of the right to bring action on his judgment, or on the original cause of action,

(a) after proceedings have been taken under this Part; or

(b) instead of proceedings under this Part;

and the taking of proceedings under this Part, whether or not the judgment is registered, does not deprive a judgment creditor of the right to bring action on the judgment or on the original cause of action.

General purpose

41. This Part shall be interpreted so as to effect its general purpose of making uniform the law of the Provinces that enact it.

NOTE:

When the *Foreign Money Claims Act*, S.B.C. 1990, c. 18, comes into force section 33 will be repealed and the following substituted:

Application of Foreign Money Claims Act

33. Where a judgment sought to be registered under this Act makes payable a sum of money expressed in a currency other than the currency of Canada,

(a) the *Foreign Money Claims Act* applies to ascertain the amount of Canadian currency payable under it,

(b) the registering court shall certify the amount payable under the judgment, in accordance with paragraph (a), on its registration, and

(c) upon its registration, the judgment shall be deemed to be a judgment for the amount so certified.

APPENDIX A

SCHEDULE 2

CERTIFICATE

CANADA: }
PROVINCE OF BRITISH COLUMBIA. }

It is certified that, among the records of the court of , at , before the Honourable , a justice [judge] of the court, in the Procedure Book there is record of an action, numbered as No. , between (plaintiff(s)) and (defendant(s)).

1. The writ of summons [*or* statement of claim, *as the case may be*] was issued on [*month, day*], 19 , and proof was furnished to this court that it was served on the defendant by delivery of a copy of it to him and leaving it with him.

2. No defence was entered, and the judgment was allowed by [proof, default *or* order]

[*Or*]

2. A defence was entered and judgment was allowed at the trial [*or as the case may be*]

3. Judgment was given on [*month, day*], 19 .

4. Time for appeal has expired and no appeal is pending [*or* an appeal against the judgment was made and was dismissed by the Court of Appeal and the time for any further appeal has expired and no further appeal is pending, *or as the case may be*].

5. Further details if any.

6. Particulars:

Claim as allowed	$	
Costs to judgment		
Subsequent costs		
Interest		
	$	
Paid on	$	
And the balance remaining due on the judgment for debt, interest and costs is		

IN TESTIMONY of which we have fixed the seal of the court at , [*month, day*], 19 .

[SEAL.] *A Justice [Judge] of the Court of*

Or

Clerk of the Court of .

APPENDIX A

COURT ORDER ENFORCEMENT – RECIPROCATING STATES

JURISDICTIONS DECLARED TO BE RECIPROCATING STATES FOR THE PURPOSES OF THIS ACT

[Printed for convenience: see *Court Order Enforcement Act*, Part 2 (section 39)]

North America:

in Canada:

- Alberta
- Manitoba
- New Brunswick
- Newfoundland
- Northwest Territories
- Nova Scotia
- Ontario
- Prince Edward Island
- Saskatchewan
- Yukon Territory

in the United States:

- Alaska
- California
- Oregon
- Washington

Europe:

Austria
Federal Republic of Germany including Land Berlin
United Kingdom

South Pacific:

in Australia:

- Australian Antarctic Territory
- Australian Capital Territory
- Coral Sea Islands Territory
- Heard and McDonald Islands Territory
- New South Wales
- Northern Territory of Australia
- Queensland
- South Australia
- Tasmania
- Territory of Ashmore and Cartier Islands
- Victoria

Nov. 3, 1989

APPENDIX B

BRITISH COLUMBIA *RULES OF COURT*

RULES 13 AND 54

RULE 13

Service Outside British Columbia

Service outside British Columbia without order

(1) Service of an originating process or other document on a person outside British Columbia may be effected without order whenever

(a) the whole subject matter of the proceeding is land in British Columbia (with or without rents or profits); or the perpetuation of testimony relating to land in British Columbia,

(b) any act, deed, will, contract, obligation or liability affecting land or hereditaments in British Columbia is sought to be construed, rectified, set aside or enforced,

(c) it is sought to construe a will affecting personal property if the testator was at the time of his death domiciled in British Columbia,

(d) relief is sought against a person domiciled or ordinarily resident in British Columbia,

(e) the proceeding is for the administration of the personal estate of a deceased person who, at the time of his death, was domiciled in British Columbia,

(f) the proceeding is for the execution (as to property in British Columbia) of a trust which ought to be executed according to the law in force in British Columbia and the person to be served is a trustee,

(g) the proceeding is in respect of a breach, committed in British Columbia, of a contract wherever made, even though the breach was preceded or accompanied by a breach outside British Columbia which rendered impossible the performance of the part of the contract which ought to have been performed in British Columbia,

(h) the proceeding is founded on a tort committed in British Columbia,

(i) an injunction is sought as to anything to be done in British Columbia, or a nuisance in British Columbia is sought to be prevented or removed, whether or not damages are also sought in respect thereof,

(j) a person outside British Columbia is a necessary or proper party to a proceeding properly brought against some other person duly served in British Columbia,

(k) the proceeding is by a mortgagee or mortgagor in relation to a mortgage of property in British Columbia and seeks relief of the nature of sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance or delivery of possession by the mortgagee, whether or not the mortgagee seeks personal judgment or an order for payment of money due under the mortgage,

(l) the proceeding is brought by or on behalf of the Crown or a municipality to recover moneys owing for taxes or other debts due to the Crown or a municipality,

(m) the proceeding is founded upon a contract, or is in respect of a claim for alimony, and the defendant has assets in British Columbia,

(n) the action is brought under the *Carriage by Air Act* (Canada),

(o) the claim arises out of goods or merchandise sold or delivered in British Columbia,

(p) the proceeding is brought upon a foreign judgment and the defendant or respondent has assets in British Columbia, or

(q) the proceeding is a divorce, a matrimonial action or an adoption. (MR 64, 71, 865, 849i; ER 11/1.) [am. B.C. Regs. 517/79; 18/85, s. 5.]

Idem

(2) Except in a divorce proceeding or a proceeding brought under subrule (3), a copy of an originating process served outside British Columbia without leave shall state specifically by endorsement in Form 6 upon which of the grounds referred to in subrule (1) it is claimed that service is permitted under this rule. (MR 64.)

Application for leave to service outside the jurisdiction

(3) In any case not provided for in subrule (1), the court may grant leave to serve an originating process or other document outside British Columbia. (MR 6; ER 11/4.)

Idem

(4) An application for leave to serve a person outside British Columbia shall be made before the originating process or other document is served and shall be supported by an affidavit or other evidence showing in what place or country that person is or probably may be found and the grounds upon which the application is made. The application may be made *ex parte*. (MR 66; ER 11/4.)

Service of order, etc.

(5) Copies of the application for leave to serve, of all affidavits in support of the application, and of the order granting leave to serve shall be served with the originating process or other document. (New.)

Time for appearance

(6) Where a person is served with an originating process outside British Columbia, the time for the appearance by that person, after service, shall be 21 days in the case of a person residing anywhere within Canada, 28 days in the case of a person residing in the United States of America, and 42 days in the case of a person residing elsewhere. The court may shorten the time for appearance on *ex parte* application. (MR 68; ER 11/4.)

Where service without leave valid

(7) Nothing in this rule shall invalidate service outside British Columbia without leave of the court where the document could have been validly served apart from this rule. (New.)

Contract containing terms for service

(8) Notwithstanding this rule, the parties to a contract may agree

(a) that the court shall have jurisdiction to entertain a proceeding in respect of the contract, and

(b) that service of a document in the proceeding may be effected at any place, within or outside British Columbia, on any party, or on any person on behalf of any party, or in a manner specified or indicated in the contract. (MR 65; ER 10/3.) [am. B.C. Reg. 467/81, s. 5.]

Idem

(9) Service of a document in accordance with an agreement referred to in subrule (8) is effective service, but no contractual stipulation as to service of a document shall invalidate service that would otherwise be effective under these rules. (MR 65a.)

Application to set aside

(10) Application may be made to set aside service of an originating process or other document served outside British Columbia without entering an appearance. Where it appears that service should not have been made outside British Columbia, the court may set aside service of the originating process or other document and may order the person initiating the proceeding to pay the costs of the applicant on a solicitor and client basis. (ER 12/8.)

Carriage by Air Act

(11) (a) Where, for the purpose of an action under the *Carriage by Air Act* (Canada) and the convention therein set out, a party proposes to serve a writ of summons upon a high contracting party to the convention, other than Her Majesty, this rule shall apply.

(b) The writ shall specify the time for entering an appearance as provided in subrule (6).

(c) A certified copy of the writ shall be transmitted by the registrar to the Secretary of State, together with a copy translated into the language of the country of the defendant to be supplied by the solicitor for the plaintiff, with a request for transmission to the government of that country.

(d) An official certificate transmitted by the Secretary of State to the court certifying that the certified copy of the writ was delivered on a specified date to the government of the country of the defendant shall be sufficient proof of service and shall be filed in the registry and be equivalent to an affidavit of service.

(e) After filing an appearance by the defendant or, if no appearance is filed, after the expiry of the time limited for filing the appearance, the action

may proceed to judgment in all respects as if the defendant had for the purposes of the action waived all privileges and submitted to the jurisdiction of the court.

(f) Where it is desired to serve or deliver any other document outside British Columbia, the provisions of this rule shall apply, mutatis mutandis. (MR 71aa; ER 11/7.)

RULE 54

Foreign Judgments

Application under Court Order Enforcement Act

(1) In this rule "convention" means the Convention for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters, the English language version of which is set out in Schedule 4 of the *Court Order Enforcement Act*.

(2) An application to have a foreign judgment registered under Part 2 of the *Court Order Enforcement Act* or under the convention shall be made by originating application.

Affidavit in support

(3) The application for registration shall be supported by an affidavit
- (a) exhibiting a certified copy of the judgment under the seal of the court where the judgment was obtained,
- (b) exhibiting a certified translation of the judgment, if given in a language other than English, and
- (c) stating, to the best of the information and belief of the deponent,
  - (i) that the judgment creditor is entitled to enforce the judgment,
  - (ii) that the judgment is not one which may not be registered under either section 31(6) of the *Court Order Enforcement Act* or Article II, paragraph 2 of the convention,
  - (iii) that the judgment debtor was duly served with the process of the original court, unless this appears from the judgment,
  - (iv) that the original court had jurisdiction to grant the judgment,
  - (v) the full name, trade or business, and usual or last known place of abode or of business of the judgment creditor and judgment debtor respectively, so far as is known to the deponent, and
  - (vi) the amount presently owing on the judgment.

Ex parte application

(4) Notice need not be given to the judgment debtor of an application under subrule (2).

Form of order to register

(5) The order giving leave to register the judgment shall be in Form 59.

Setting aside registration of judgment under convention

(6) An order that a foreign judgment be registered under the convention may be set aside where the court is satisfied that

(a) the judgment debtor, being the defendant in the original proceedings, either was not served with the process of the original court or did not receive notice of those proceedings in sufficient time to enable him to defend the proceedings and, in either case, did not appear,

(b) another judgment has been given by a court having jurisdiction in the matter in dispute prior to the date of judgment in the original court, or

(c) the judgment is not final, or an appeal is pending, or the time for appeal has not expired.

Stay of proceeding on foreign judgment

(7) A defendant in an action on a foreign judgment, on proof that an appeal or other proceeding in the nature of an appeal is pending, or the time for appeal has not expired, may apply for an order staying the proceeding until the determination of the appeal or other proceeding on terms that the court may impose.

APPENDIX C

SUMMARY OF TENTATIVE PROPOSALS MADE IN *WORKING PAPER ON THE ENFORCEMENT OF JUDGMENTS BETWEEN CANADIAN PROVINCES* (W.P. No. 64, 1989)

The Working Paper discussed the current law and analyzed in detail various options for its amendment. The need to revise the law, and reasons underlying the approach tentatively proposed by the Commission, were set out at length. The following is a summary of the main features of the Commission's tentative proposals. In the Working Paper, they took the form of annotated draft legislation. The interested reader should refer to the Working Paper for more information.

- The policy of the new legislation would be to treat judgments from other provinces and territories as if they had been made by a local court.
- The ability of a local court to review or prevent enforcement of the original judgments would be very limited.
- The legislation would apply to judgments for the payment of money.
- Such judgments from other provinces and territories would be registrable with the Supreme Court.
- Upon registration, they would be enforceable. There would be no need, for example, for the judgment creditor to give the judgment debtor notice of the registration.
- The situations in which a court would stop enforcement of a registered judgment would be few and clearly set out in legislation.
- In most cases, a judgment debtor who contested the validity of the judgment would be able to do so only in the province or territory where the judgment was made. A local court, however, might grant a judgment debtor some time to do this by temporarily staying enforcement of the judgment.
- Among other things, the draft legislation clearly set out
  - how a judgment would be registered,
  - what kinds of judgments could not be registered,
  - the limitation period for registering the judgment,
  - the treatment of interest accrued on the judgment, and
  - a remedy for the judgment debtor where a judgment should not have been registered.